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No. 89-478

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

STATE OF MARYLAND,

Petitioner,

v.

SANDRA ANN CRAIG,

Respondent.

On Writ Of Certiorari To The Court Of Appeals Of Maryland

REPLY BRIEF FOR PETITIONER

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REPLY ARGUMENT

I. LESS THAN FACE-TO-FACE CONFRONTATION IS PERMISSIBLE WHEN IT FURTHERS AN IMPORTANT PUBLIC INTEREST AND IS BASED ON CASE-SPECIFIC FINDINGS OF NECESSITY.

Respondent Craig acknowledges that the right to face-to-face confrontation is not absolute (Br. 10-11), but then urges this Court to "recognize the need for, and adopt, an inflexible rule of right to face-to-face confrontation in all situations not coming within a long-recognized exception to the rule against hearsay" (Br. 23). Craig's proposed rule eviscerates the flexi-

bility that has been the hallmark of this Court's approach to confrontation issues. *E.g.*, *Mattox v. United States*, 156 U.S. 237, 243 (1895) ("general rules of this kind, however beneficent in their operation and valuable to the accused, must occasionally give way to considerations of public policy and the necessities of the case"); *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973) ("the right to confront and to cross-examine is not absolute and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process"). Indeed, Craig's inflexible rule requires this Court to jettison its 1980 landmark decision on confrontation and to veer radically from the "middle course" the Court has chosen to follow. *Ohio v. Roberts*, 448 U.S. 56 & 66 n.9 (1980).

In *Ohio v. Roberts*, the Court recognized that hearsay statements fitting within a firmly-rooted exception, as well as those that do not, may be admissible. *Id.* at 66. The latter, however, must first be shown to satisfy particularized guarantees of trustworthiness. *Id.*; *accord Bourjaily v. United States*, 483 U.S. 171, 183 (1987). Craig's proposed rule directly contravenes what the *Roberts* Court said about non-traditional hearsay exceptions. More importantly, it disregards the fact that in *Coy v. Iowa*, 487 U.S. ___, 108 S.Ct. 2798, 2803 (1988), the Court borrowed from *Roberts* and *Bourjaily* to suggest that a child-protective device that implicates a defendant's right to face-to-face confrontation, but which is not firmly rooted in our legal tradition, may be permissible if supported by individualized findings of necessity.

Not only has Craig's rigid rule already been rejected by the Court, the two premises underlying the

rule are faulty. Craig first posits an absolute need for face-to-face confrontation (except when hearsay fits within a firmly-rooted exception) because "[c]onfrontation is the 'greatest legal engine ever invented for the discovery of truth.' " (Br. 10 (quoting *Kentucky v. Stincer*, 482 U.S. 730, 736 (1987)). This premise distorts the oft-quoted language of Wigmore, which refers expressly to cross-examination, not to confrontation. 5 J. Wigmore, *Evidence* § 1367, at 29 (3d ed. 1940). It also fails to take into account that Craig was permitted to cross-examine each child witness at trial without restriction. (J.A. 102-49, 152-53 (Brooke Etze); 179-92, 195-96 (Drew Woodbury); 225-42 (Jessie Sue Smith); 260-70 (Justin Peeples)). Furthermore, because the right to cross-examine is "[s]ubject always to the broad discretion of a trial judge to preclude repetitive and unduly harassing interrogation," *Davis v. Alaska*, 415 U.S. 308, 316 (1974), it is illogical to say that the face-to-face component of cross-examination cannot be precluded when it not merely harasses a child witness, but actually causes the child to be entirely incapable of testifying.

Craig's second premise—that the integrity of the fact-finding process requires nothing less than face-to-face confrontation—is equally faulty. In Craig's view, which she supports in part by referring to the child abuse cases from Jordan, Minnesota (Br. 17-18), child witnesses are particularly susceptible to pre-trial coaching and other suggestive procedures, and the resultant unreliability can only be ferreted out by compelling children to testify in the physical presence of the defendant, the judge, and the jury. (Br. 13-23). This proposition cannot withstand scrutiny for any number of reasons.

First, to the extent that Craig suggests that she has been the victim of false accusations and hysteria, she digresses from the constitutional issue before this Court. In any event, the record here belies such a contention.[1] The medical evidence adduced at trial confirmed the children's complaints of abuse. Through Dr. Shubin, a clinical pediatrician specializing in the field of child sexual abuse, the State demonstrated the very real nature of the genital and anal injuries sustained by Brooke Etze and the three other children who testified at trial via closed-circuit television.[2]

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[1] For the reasons that follow in text, the record also belies any similar suggestion that might be gleaned from Craig's Statement of the Case. (Br. 1-8). Moreover, because the record in this case consists of a transcript in excess of 4,000 pages and numerous exhibits, it is difficult even to discern, absent references to the joint appendix or the record, the factual basis of Respondent's statement.

[2] For example, Dr. Shubin explained that Brooke's hymen "gaped open to a one point five centimeter or fifteen millimeter diameter opening" (Tr. 3/17/87, at 165); the opening of a normal hymen of a child of Brooke's age is four millimeters (*id.*). Additionally, "the hymen itself was not normal." (*Id.* at 166). At its lower edge, it "was considerably thickened"; there also was "a retracted scar which means that the hymen had a part of it not smooth all the way around, but pulled back into the tissue of the vagina itself." (*Id.*). Brooke also "had scarring in the tissue adjacent to the hymen which is, in fact, vaginal wall." (*Id.* at 167). In Dr. Shubin's opinion, Brooke's injuries were caused by "[s]ome object" being "pushed into this child past an inch and a quarter." (*Id.* at 170).

Regarding Drew Woodbury, Dr. Shubin described a linear, *i.e.*, straight-line, scar that extended from the interior of Drew's anus to the outside skin. (Tr. 3/23/87, at 5-7). This abnormal scar represented a healed injury caused by "an object penetrating from outside into this child's anal opening." (*Id.* at 8). Dr. Shubin further testified that Jessie Sue Smith's perihymenal

The evidence presented at trial also demonstrated that Sandra Craig was the person who inflicted the abuse described by the children and corroborated by Dr. Shubin. Craig was a common variable in the lives of the four children. (Tr. 3/16/87, at 143; Tr. 3/20/87, at 61, 143, 191). She was shown, by witnesses other than the four children, to have taken children, including Brooke Etze, to her upstairs office. (Tr. 3/17/87, at 85-86; Tr. 3/18/87, at 161-63; Tr. 3/19/87, at 112-14). The children would look frightened and withdrawn when they returned. (Tr. 3/19/87, at 113-14). Craig also demonstrated a great deal of anxiety when she could not find a certain stick that was fourteen to eighteen inches in length and approximately a quarter inch in diameter. (*Id.* at 118-19, 144-46). Brooke testified that Craig had touched her in her

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tissue was severely scarred. (*Id.* at 10-11). One scar revealed that the tissue had been stretched; a second scar indicated that the tissue surface probably had been broken by the original injury. (*Id.* at 11). In Dr. Shubin's expert view, "there must have been a penetrating injury from an object pushed in from outside. It was pushed toward the back of the vaginal opening because that's where the injuries are." (*Id.* at 14).

Examination of Justin Peeples's anus revealed an "eight millimeter square depressed scar." (*Id.* at 18). Dr. Shubin explained that he had "never seen such a strikingly well demarcated square scar in this area of a child." (*Id.* at 19). He described the scar as "consistent with an injury caused by the tip of a screwdriver being pushed into the tissue and damaging it." (*Id.*). As to this injury and those sustained by Brooke, Drew, and Jessie, Dr. Shubin testified that there was a "remarkable consistency in pattern," that "all requir[ed] the same mechanical force," and that "there is certainly evidence that an object has been forced into each of these children in a similar manner." (*Id.* at 21). Even the pediatrician who examined the children on behalf of Craig did not contradict these findings. (Tr. 3/26/87, at 172-93).

private parts with a stick. (J.A. 95). All of this evidence corroborated the children's claims that they had been abused and that Craig was their abuser.[3]

Craig's second premise is also based on the mistaken notion that child witnesses will lie unless forced to testify in the courtroom. (Br. 21). To the contrary, child victims of abuse are likely to provide more, not less, accurate evidence if permitted to testify outside the defendant's presence. *See* Brief for American Psychological Association as *Amicus Curiae* 18-23; *Coy v. Iowa*, 108 S.Ct. at 2809 n.5 (Blackmun, J., dissenting).[4] Furthermore, before the children here were permitted to testify via closed-circuit television, the trial court examined them for competency, determining that each child knew the difference between telling the truth and telling lies; that each knew that it was wrong to lie; and that each would testify about what he or she remembered and would not say things that someone else may have told them. (J.A. 74-82

[3] The fact that some of the children also may have been abused by Craig's son, Jamal, does not undermine the children's claims that they were abused by Craig. Both the trial court and the Maryland Court of Special Appeals expressed this same view, in the context of an issue that is not before this Court. (Pet. App. 39a-40a).

[4] *Accord* Brief for People Against Child Abuse, The Association for Childcare Excellence, The National Center for Missing and Exploited Children, and Rosie's Patrol as *Amici Curiae* 14-18; Brief for National Association of Counsel for Children; The National Court Appointed Special Advocate Association; The State of Alaska, Office of Public Advocacy; and The State of Rhode Island, Office of the Child Advocate as *Amici Curiae* 20-23; Brief for Stephanie Roper Foundation as *Amicus Curiae* 16-19.

(Brooke Etze); 164-76 (Drew Woodbury); 197-208 (Jessie Sue Smith); 244-54 (Justin Peeples)).

Moreover, Craig had ample opportunity to cross-examine each child witness. Of course, cross-examination is the appropriate tool for testing a witness's recollection, probing the details of a witness's motives for testifying, and sifting a witness's conscience so that the jury can determine whether the testimony is worthy of belief. *See Chambers v. Mississippi*, 410 U.S. at 295; *Mattox v. United States*, 156 U.S. at 242-43. That the jury viewed this cross-examination via television monitors did not undermine its efficacy, and may well have improved the jury's opportunity to assess the children's demeanor. *See* Brief for Stephanie Roper Foundation as *Amicus Curiae* 19-21.

Craig's second premise fails for the related reason that it misapprehends what this Court means when it speaks of the integrity of the truth-determining process. The integrity of the truth-determining process contemplates that the jury will be provided with relevant raw data, *i.e.*, evidence, which it then will weigh and assess to reach a verdict. Consonant with this view, juries are permitted to consider hearsay evidence, even though the declarant is unavailable to present this testimony. *E.g.*, *Ohio v. Roberts*, 448 U.S. at 76-77. Similarly, as in *United States v. Owens*, 484 U.S. 554 (1988), and *Delaware v. Fensterer*, 474 U.S. 15 (1985) (per curiam), juries are allowed to hear evidence from witnesses who are unable to remember the basis of their testimony.

Under the rule proposed by Craig, only live testimony from a witness in a courtroom and hearsay testimony that falls within a firmly-rooted exception would be available for a jury's consideration. While

live courtroom testimony is obviously preferred, live testimony from a child who is fully available for cross-examination—but who is functionally unavailable to testify in the defendant's presence—is preferable to hearsay testimony, which deprives the defendant of the ability to cross-examine the declarant. Full live direct and cross-examination testimony via closed-circuit television is also preferable to testimony of a witness who lacks the ability to recall the basis for his statements. And, of course, such testimony is certainly preferable to no testimony.

In sum, this Court should reject the inflexible and illogical rule proposed by Craig, and instead adopt the standard that was foreshadowed in *Ohio v. Roberts*, 448 U.S. at 66; suggested by a majority of the *Coy* Court, 108 S.Ct. at 2803; and advocated in the concurring opinion in *Coy*, *id.* at 2805 (O'Connor, J.). Simply stated, less than face-to-face confrontation should be permissible when it furthers an important public interest and is based on case-specific findings of necessity.

II. SECTION 9-102 IS A PROPER RESPONSE TO THE IMPORTANT PUBLIC INTEREST IN PROTECTING VICTIMS OF CHILD ABUSE.

In an effort to undercut the *Coy* Court's suggestion that protecting children may warrant less than face-to-face confrontation between a defendant and a child witness, Craig contends that the State of Maryland's failure to include all child victims of all violent crimes within the purview of its statute authorizing use of one-way closed-circuit television demonstrates that the State has no such compelling interest. (Br. 24-27). Stated more particularly, in Craig's view, since the "underinclusiveness" of Section 9-102 suffices to render the statute unconstitutional, such "underinclusiveness" certainly precludes the State from demonstrating a compelling interest. (Br. 26). Craig's contention is fatally flawed in several respects.

Preliminarily, if Craig is attempting to challenge the constitutionality of Section 9-102 on the ground that it presents an equal protection problem, she should not be allowed to do so, since she never raised such a challenge in the Maryland courts. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970). In any event, Craig's "underinclusiveness" argument is without merit.

First, Craig's reliance on language from Justice Jackson's concurring opinion in *Railway Express Agency, Inc. v. New York*, 336 U.S. 106, 112-13 (1949), (Br. 27), overlooks the more pertinent statement in the majority opinion: "It is no requirement of equal protection that all evils of the same genus be eradicated or none at all." 336 U.S. at 110. Second, by limiting the use of closed-circuit television to children who are victims of abuse by a parent or a person standing in loco parentis, the State not only avoids an overly broad rule like those criticized in cases such as *Coy v. Iowa*, 108 S.Ct. at 2803; *Rock v. Arkansas*, 483 U.S. 44, 56-58 (1987); and *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607-08 (1982), it also has selected only those victims who are most vulnerable to the traumatizing and chilling effects of face-to-face confrontation.

"A child's feelings of vulnerability and guilt, and his or her unwillingness to come forward are particularly acute when the abuser is a parent." *Pennsylvania v. Ritchie*, 480 U.S. 39, 60 (1987). Because a parent or one standing in loco parentis is the ultimate

authority figure for a child, and because a child is most susceptible to trauma and undue influence by an authority figure, it is the child who has been abused by this very authority figure who is in the greatest need of Section 9-102's special protection. The fact that other classes of children or even other classes of victims might benefit from the protection accorded by Section 9-102 does not mean that the State has acted improperly by narrowly tailoring its statute.

Having initially taken issue with the State's failure to enact a broader statute, *i.e.*, one that covers more victims and thus implicates the confrontation right of more defendants, Craig next challenges the State's failure to enact a statute that first contemplates the use of two-way closed-circuit television. (Br. 28-29). Of course, if two-way closed-circuit television does not substantially implicate a defendant's right of confrontation, *see Coy v. Iowa*, 108 S.Ct. at 2804 (O'Connor, J., concurring), then presumably it could be used without any showing of case-specific necessity. And, if a two-way television procedure does implicate the right to confront, it does so because it induces the very trauma the one-way television procedure is designed to avoid.

Nonetheless, even if a less intrusive procedure exists, it need not be considered prior to using the one-way procedure. Indeed, by so suggesting, Craig asks this Court to adopt an analysis that heretofore has been applied only in the First Amendment arena. This Court has declined, however, to engraft a "least restrictive" requirement onto other constitutional amendments. *E.g.*, *Blystone v. Pennsylvania*, 493 U.S. ___, 110 S.Ct. 1078, 1084 (1990) (in upholding death sentence imposed under Pennsylvania statute,

which differed in form from death penalty statutes of other States, this Court said that "[w]ithin the constitutional limits defined by our cases, the States enjoy their traditional latitude to prescribe the method by which those who commit murder shall be punished"); *United States v. Sharpe*, 470 U.S. 675, 687 (1985) (quoting *Cady v. Dombrowski*, 413 U.S. 433, 447 (1973)) (in upholding defendant's detention, this Court noted that " 'the fact that the protection of the public might, in the abstract, have been accomplished by "less intrusive" means does not, by itself, render the search unreasonable' "). The Court should refuse to do so in the Sixth Amendment context as well. And, nothing in this case should prompt the Court to deviate from its long-standing policy of according great deference to a state's establishment and implementation of criminal trial procedures. *E.g.*, *Marshall v. Lonberger*, 459 U.S. 422, 438 n.6 (1983); *Chambers v. Mississippi*, 410 U.S. at 302-03.

Craig next urges this Court to reject the one-way closed-circuit television procedure because it infringes upon a host of constitutional rights other than the right to confront. (Br. 29-35). Craig's argument in this regard constitutes little more than a veiled attempt to raise issues not presented for the Maryland courts' consideration in this case, and thus it is not properly before the Court. *See Adickes v. S.H. Kress & Co.*, 398 U.S. at 147 n.2. Additionally, Craig's contentions ignore the facts of this case. Craig was not deprived of her right to counsel: she had two lawyers representing her at trial. (J.A. 88). Craig also was not denied access to counsel. While the children testified, Craig sat in the courtroom with one of her two attorneys. (J.A. 88). As to her claim that the

telephone hook-up between the courtroom and the judge's chambers did not work properly, Craig primarily supports this contention by pointing to problems that arose while Brooke Etze was being examined for competency. (Br. 31-33). Under *Kentucky v. Stincer*, 482 U.S. at 744, Craig had no constitutional right to participate in the competency hearing. And, Craig fails to mention that, when she complained about an inability to reach counsel in the judge's chambers during Brooke's cross-examination testimony, the court allowed Craig to reopen cross-examination to ask additional questions. (J.A. 141-49).[5]

Craig's contention that she was denied her right to a jury is equally unfounded. The jury was able to assess each child's demeanor via the two television monitors in the courtroom. (J.A. 89). In this respect, Craig's jury was in a superior position to a jury that is asked to consider hearsay evidence of a declarant it never sees. Nor did the procedure here lessen the jury's fact-finding role. The trial court expressly instructed the jury that Craig was presumed innocent and that it was within the jury's sole province to weigh the evidence and assess the witnesses' credibility. (Tr. 4/1/87, at 3-6).

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[5] Interestingly, in *Wildermuth v. State*, 310 Md. 496, 525-26, 530 A.2d 275, 289-90 (1987), a case upon which Craig relies extensively to support her third and fourth arguments, the Maryland Court of Appeals determined that Section 9-102 does not unconstitutionally infringe upon a defendant's right to counsel. And, although the Court of Appeals' decision in the instant case did not address the issue, the Maryland Court of Special Appeals rejected the notion that Craig was harmed by any defects in the telephone hook-up system. (Pet. App. 58a-60a).

In sum, as stated at pages 21 to 27 of its principal brief, the State of Maryland has legitimate and compelling interests in protecting victims of child abuse.[6] The State's one-way closed-circuit television procedure constitutes a proper response to the host of problems that attend child abuse prosecutions. And, because the need for the procedure was amply demonstrated, see Argument III, *infra*, there has been no violation of Craig's right of confrontation.

III. THE USE OF ONE-WAY CLOSED-CIRCUIT TELEVISION BY THE CHILD VICTIMS WAS BASED ON APPROPRIATE CASE-SPECIFIC FINDINGS OF NECESSITY.

Craig's third argument is based on the notion that the trial court did not determine that it was Craig's physical presence that would cause the child witnesses to suffer serious emotional distress such that they would be incapable of reasonably communicating. (Br. 35-40). Craig is mistaken.

The evidence considered by the court directly focused on the effect Craig's physical presence would have on the children. (J.A. 37-46, 52-59). Merely be-

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[6] Maryland's interest in protecting child victims is shared by a majority of the States. *See generally* Brief for State of Florida as *Amicus Curiae*. Thirty-five states, as well as the Commonwealth of Puerto Rico and the U.S. Virgin Islands, joined Florida's brief. Given the large number of children who are victims of abuse, this wide interest is not surprising. Since Maryland's principal brief was filed, a new study reflecting updated statistics regarding reported incidents of child abuse and neglect has been published. In 1989, 2.4 million reports were filed, approximately 10% more than were filed in 1988. *Current Trends in Child Abuse Reporting and Fatalities: The Results of the 1989 Annual Fifty State Survey* 2 (National Committee for Prevention of Child Abuse, March, 1990).

cause the trial court couched its ruling in terms of Section 9-102's actual language does not mean that the court did not address the consequences of the children's testifying in front of Craig. Although this Court is not bound by appellate fact-finding, *Beck v. Ohio*, 379 U.S. 89, 93 (1964), the Court of Special Appeals of Maryland's conclusion in this regard is compelling:

> Given the context of the issue, . . . —the State's motion, the evidence given by Ms. Burke and Dr. Sweeney, and the argument of counsel—it is apparent that the court's concern was not so much forcing the children to testify in open court as requiring them to testify in the direct presence of Ms. Craig.

(Pet. App. 57a-58a).

Additionally, the trial court here had the unique opportunity, after trial and after the Maryland Court of Appeals had filed its decision in *Wildermuth v. State*, 310 Md. 496, 530 A.2d 275 (1987), to reassess its decision regarding the propriety of allowing the closed-circuit procedure. (J.A. 274-93). It did so after Craig's counsel filed a motion for new trial based on *Wildermuth*. (J.A. 272-73). In *Wildermuth*, which the trial court read several times (J.A. 292), Maryland's high court determined that a Section 9-102 finding of inability to communicate reasonably "is tantamount to a finding of unavailability in the *Roberts* sense, and meets the necessity prong of the *Roberts* test." 310 Md. at 519, 530 A.2d at 286. In this regard, the *Wildermuth* decision foreshadowed the standard advocated by the concurring Justices in *Coy*, 108 S.Ct. at 2805, and suggested by the *Coy* majority, *id.* at

2802-03. For Craig to suggest then that the trial court ruled as it did without the benefit of *Wildermuth* (Br. 37) overlooks that the trial court thoroughly considered *Wildermuth* when Craig's own attorneys brought that case to the court's attention.

Significantly, Craig expends little effort arguing that the expert testimony offered at the pre-trial hearing does not support findings that use of the closed-circuit television procedure was necessary. Indeed, any attempt to do so would prove futile. Mary Burke's testimony that Brooke Etze would probably stop talking and curl up if forced to testify in Craig's presence and that Brooke perceived her life and the lives of her parents as having been threatened by Craig clearly supports the determination that Brooke needed the special protection of closed-circuit television. (J.A. 39, 44). To like effect is Ms. Burke's testimony that it was necessary to remove the threatening agent, Craig, in order to maximize Justin Peeples's ability to communicate. (J.A. 41). Similarly, Ms. Burke's testimony that Jessie Sue Smith's fear of facing Craig would cause Jessie not to share information with the jury and would cause Jessie to regress amply supports the finding that that child needed the special protection of Section 9-102. (J.A. 43). And, Dr. Sweeney's testimony that Drew Woodbury's ability to communicate would be very impaired if he were to testify in an open court in the presence of Craig likewise demonstrates the propriety of allowing this child to testify via closed-circuit television. (J.A. 54).

The State of Maryland suggests that there are a number of relevant factors, any one of which might justify use of a child-protective device such as one-

way closed-circuit television. These factors include: (1) the manner in which the offense was committed; (2) whether a deadly weapon or dangerous instrument was used; (3) whether the offense was an isolated incident or part of an ongoing course of conduct; (4) the victim's age; (5) the victim's psychological maturity; (6) the desires of the parents and/or the victim; (7) whether the accused occupied a position of authority with respect to the victim; and (8) whether the victim has been threatened. *Cf. Globe Newspaper Co. v. Superior Court*, 457 U.S. at 608 (suggesting similar factors could justify courtroom closure).

Here, in addition to the expert testimony discussed above, the trial court had before it, and implicitly considered, all of these factors. By virtue of its opportunity to rule on the issue both before and after trial, the court knew the following: (1) Craig was charged with having physically and sexually abused the children; (2) a stick and screwdriver were used to commit the abuse; (3) the abuse occurred over an extended period of time; (4) the children were only four, five, and six years old; (5) the children were psychologically immature; (6) the children had expressed desires not to see Craig; (7) Craig had supervised and taught the children at her day-care center; and (8) Craig had threatened to harm the children and their families.

In sum, the trial court's decision in this case was properly focused and amply supported. There was no need for the trial court to have observed the children in Craig's physical presence before allowing them to testify as they did.

IV. THE COURT OF APPEALS' DECISION DOES NOT REST ON ADEQUATE AND INDEPENDENT STATE GROUNDS.

Under the standard established by *Michigan v. Long*, 463 U.S. 1032, 1037-44 (1983), this Court will not review a state court judgment if it rests on an adequate and independent state ground. Stated otherwise, if a state court judgment or opinion contains a plain statement that federal law is being used only for guidance, and does not compel the court's result, this Court will refuse to review the state court decision, except in certain limited circumstances. *Id.* at 1041 & n.6; *accord Delaware v. Van Arsdall*, 475 U.S. 673, 678 n.3 (1986). Here, rather than containing the requisite plain statement that it rests on an adequate and independent state ground, the Court of Appeals' decision contains a plain statement that it is compelled by federal law, particularly this Court's decision in *Coy v. Iowa*. At the very outset of its opinion, the Court of Appeals stated: "[W]e reverse because, as we read *Coy*, the showing made by the State was insufficient to reach the high threshold required by that case before § 9-102 may be invoked." (Pet. App. 3a). Later in its opinion, the Court of Appeals said: "[W]e believe *Coy* requires us to limit the use of the exception embodied in § 9-102 to circumstances even narrower than those we delineated in *Wildermuth*." (Pet. App. 12a).

Furthermore, although the Court of Appeals' decision contains references to Article 21 of the Maryland Declaration of Rights,[7] which provision is

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[7] Article 21 provides in pertinent part: "That in all criminal prosecutions, every man hath a right . . . to be confronted with the witnesses against him . . . ."

virtually identical to the Sixth Amendment's Confrontation Clause, the following typifies the court's use of Article 21: "Thus, we construe the phrase 'in the courtroom' as meaning, for sixth amendment and Article 21 confrontation purposes, 'in the courtroom in the presence of the defendant.' " (Pet. App. 16a). Such use of Article 21 "in direct conjunction with the United States Constitution" is akin to the circumstances that confronted this Court in *New York v. Class*, 475 U.S. 106, 109 (1986), a case in which the Court rejected the defendant's claim that jurisdiction should be declined.

Finally, as Craig acknowledges (Br. 45), the Maryland Court of Appeals adheres to the rule that "[o]rdinarily, courts do not pass upon a constitutional question, although properly presented by the record, if there is also present some other ground upon which to dispose of the case, and do not decide questions of a constitutional nature unless absolutely necessary to a decision of the case." *Employment Security Administration v. Baltimore Lutheran High School Assoc.*, 291 Md. 750, 754 n.2, 436 A.2d 481, 484 n.2 (1981) (citing *Ashwander v. TVA*, 297 U.S. 288, 346-48 (1936) (Brandeis, J., concurring)). Thus, as it did in *New York v. Class*, 475 U.S. at 110, this Court should infer that the Maryland Court of Appeals believed that any state statutory ground was insufficient to resolve the instant case.

In sum, Craig's final argument, which she initially raised in her brief in opposition to the State's petition for writ of certiorari (Br. Opp. to Pet. 2-8), has no more merit now than it did when first presented to this Court. Accordingly, the contention should be rejected and the merits of this case considered.

CONCLUSION

For the reasons stated herein and in the State of Maryland's principal brief, the judgment of the Court of Appeals of Maryland should be reversed.

Respectfully submitted,

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